Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)		CC Docket No. 92-90
	)	

To: The Commission

REPLY COMMENTS TO FNPRM

I, Dennis C. Brown, hereby file Reply Comments in response to the Commission's Further Notice of Proposed Rule Making (FNPRM) released March 25, 2003 in the above captioned proceeding. In support of my position, I show the following.

In its FNPRM, the Commission invited comments on maximizing consistency with the rules promulgated by the Federal Trade Commission (FTC). Many persons filed comments which went well beyond the bounds of the Commission's request, necessitating a reply not only to the comments which were restrained, but also those which raised other issues.

Introduction

Progressive Business Publications (PBP) stated that

> the nation tolerates some unpopular speech and actions that some people don't like including:
>
> * Distasteful pornography
> * Distortions and deception of free press
> * Some content on television
> * Press camping out across the street from our homes
> * Junk mail
> * Telemarketing calls disbursing information about a commercial transaction,\

PBP at 2. It is a wise businessman who can correctly locate his industry among the countless ways of making money in these United States. PBP filed its comments prior to the action taken

by the "New York Times" against allegedly distorting and deceiving reporter Jayson Blair. America is dealing with its problem industries, one industry at a time. Congress has given the Commission a deadline for dealing with telemarketing calls and the "New York Times" has set a good example for the Commission to follow.

Complaints About FTC Actions Don't Belong Here

The Federal Communications Commission is the wrong forum within which to complain about the actions of the Federal Trade Commission. The FCC has no power over the FTC. To the extent that Teleperformance USA, Interactive Teleservices Corporation (ITC), MBNA America Bank, N.A. (MBNA), and Direct Marketing Association (DMA) brought complaints to the Commission that are more properly placed before Congress or the Court of Appeals, the Commission should disregard their comments.

The complaint against the FTC presented by ITC in the above captioned proceeding is worthy of reply. ITC complained that the FTC "preceded its solicitation of comments with a one-sided publicity campaign in favor of the results it wanted," ITC at 12. ITC was free to use its in-house telemarketing resources to call an unlimited number of telephone consumers during the dinner hour and during TV prime time and solicit their participation in FTC and Commission proceedings in support of telemarketing but ITC either failed to do so or its telemarketing methods were so unsuccessful that it did not receive the support of a substantial number of consumers who desire to receive telemarketing contacts and deliberate hang ups. In the above captioned proceeding, with no more urging from the Commission than the release of an NPRM and an FNPRM, thousands of consumers have expressed their displeasure with telemarketing and, in view of the intent of the TCPA, their concerns should guide the Commission's actions.

Pre-emption Is Neither Necessary Nor Desirable

Although the Commission's FNPRM did not seek comment on whether it should pre-empt state regulation of telemarketing, many in that industry took the opportunity to address the question. Those commenters included Software and Information Industry Association (SIIA); Infocision Management, Inc.; Sprint Corporation (Sprint); MBNA; Securities Industries Association; Nextel Communications, Inc. (Nextel); Directv, Inc.; and Bank One Corporation. While the Commission should expressly declare its exclusive jurisdiction over interstate telemarketing, there is no need for the Commission to pre-empt state regulation of intrastate telemarketing.

It is beyond reasonable doubt that a state has no authority to regulate telemarketing calls which originate outside its boundaries. The Commission can and should settle any remaining doubt by declaring its exclusive jurisdiction over interstate telemarketing and prohibiting the several states from attempting to regulate interstate telemarketing calls. With such a declaration in hand, telemarketers can fend off state attempts at interstate regulation and frivolous civil actions.

Whether state laws regulating intrastate telemarketing are consistent with one another is not a concern of the TCPA, the Telephone Consumer Fraud and Abuse Prevention Act, or the Do-Not-Call Implementation Act and need be of no concern of the Commission. The TCPA expressly protects a state's right to regulate telemarketing which both originates and terminates within its boundaries. The legislature of each of the several states should continue to have the right to decide how best to protect its citizens from intrastate telemarketing. A person conducting intrastate telemarketing should have no difficulty complying with the laws of its

state. Whether the laws of one state which regulate intrastate telemarketing resemble those of a different state should be of no concern to an intrastate telemarketer and, thus, should be of no concern to the Commission.

Predictive Dialers Should Be Banned

Numerous telemarketers have addressed the use of predictive dialers and have requested that the Commission establish a standard for the percentage of times which when they initiate calls to a residence, they may cause the resident to divert his attention and arise from his dinner table[1] or bed[2] to answer the phone, and then hang up on the victim. Some have requested authority to so abuse up to five percent of the residents whom they call, amounting to perhaps millions of such assaults per day.

Some telemarketer commenters are correct in asserting that predictive dialers have been developed subsequent to the TCPA. The Commission should seize this opportunity to carry out the consumer protection purposes of the TCPA and update its Rules to protect consumers by flatly banning the use of predictive dialers.[3]

A predictive dialing system which hangs up on a called residence clearly violates the intent of Section 64.1200(e)(2)(i) of the Commission's Rules, 47 C.F.R. §64.1200(e)(2)(i), because it does not provide the called party with the opportunity to demand, at that time and at

---

[1] *mensa interruptus*

[2] *quietus interruptus; connubium interruptus*

[3] Since the filing of initial comments in the above captioned proceeding, the rate at which I have received predictive dialer hang ups and prerecorded commercial messages to my residence has increased greatly. On some recent days, I have received as many as six hang ups and two prerecorded pitches. This has to stop and the Commission is the only agency with the authority to stop it. I am a telephone consumer. Protect me.

no cost to the called party, a copy of the telemarketer's written do-not-call list policy. Such a system also does not provide the victim an opportunity to demand placement at that time on the telemarketer's do-not-call list. The Commission should clearly, unambiguously, and with finality close any loophole which allows any use, whatsoever, of any automatic telephone dialing system which does not connect every called party who answers with a human being immediately the telephone is answered.

The costs of banning the use of predictive dialers asserted by some telemarketers are not credible. While some (*e.g.*, Sprint) have suggested that they would incur costs to comply with limitations on predictive dialers, the only out of pocket cost to discontinue the use of a predictive dialer is the labor required to pull the power plug from the wall. Sprint admitted that it can hire additional personnel to replace predictive dialers, thereby adding, perhaps substantially, to the rolls of the employed. Worldcom complained that it would need time to conform to a limit on predictive dialers, but no time at all will be required for Worldcom simply to stop.

The Commission should disregard the suggestion of ITC that jobs might be lost or that operations might be moved offshore if limits were placed on predictive dialers. ITC provided only unsubstantiated guesses as to the number of jobs affected. Further, ITC did not pledge

not to move offshore to use cheaper labor if the Commission did not adopt the abandonment rate which it suggested.

Among the commenters predicting dire consequences, only Nextel attempted to quantify a loss of efficiency. Nextel suggested at its page 14 that under the FTC's 3% abandonment rate, its contractors' number of operator contacts would drop from ten to three or four per hour, and Nextel suggested that such a result would possibly force Nextel to severely curtail or even eliminate outbound calling. Okay, that would be a good start on reducing the invasion of telephone consumer privacy caused by telemarketing. Even better for the consumers whom the TCPA directs the Commission to protect will be the banning of predictive dialers.

None of the commenters who favored a permissible rate of call abandonment, none suggested any mechanism for reporting to the Commission or for inspection and enforcement by the Commission. Unless the Commission is prepared to require the submission of regular call abandonment reports, allocate adequate personnel to reviewing those reports and to inspecting telemarketers and enforcing its rules, then the Commission has no reasonable choice but to ban the use of predictive dialers.

While I do not support in any way the Commission's permitting the use of predictive dialers, if the Commission adopts a safe harbor percentage of abandonment, the percentage should be the percentage of calls made to a certain telephone number on a certain day. If the Commission were to adopt a safe harbor of three percent, then a telemarketer should not be permitted to abandon more than three percent of the calls which it made to any residential number on any day. Any more liberal other rule would allow great abuse by a telemarketer.

If a percentage were applied to all calls made on a per day basis, for each 3400 contact calls made per day, a telemarketer could call me 100 times that day and hang up each time without exceeding a 3% daily average. Accordingly, any safe harbor percentage should be in terms of calls made on a certain day to a certain telephone number.

The Constitutional Requirement

The Commission's telemarketing regulations need not balance benefit to consumers versus cost to telemarketers to be constitutional. The test of constitutionality to be applied to regulation of commercial speech is that of Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557 (1980) ("Central Hudson"), wherein the Supreme Court explained that

> at the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest,

Central Hudson at 566 (1980).

There is no question before the Commission of whether the commercial speech of telemarketers concerns lawful activity or is misleading; those issues are for the FTC. No one disputes that the governmental interest is substantial. The Commission need concern itself only with the latter two prongs of the Central Hudson test. The Commission need only concern itself with whether its actions materially and directly advance the asserted governmental interest and whether the speech restriction is not more extensive than necessary

to serve the interests that support it. The "least restrictive means" is not the standard; instead, the case law requires a reasonable fit between the stated ends and the means chosen to accomplish those ends -- a means narrowly tailored to achieve the desired objective.

My Turn

Despite the Commission's attempt to discourage such actions, many telemarketers took the opportunity in their comments to the FNPRM to revisit arguments made earlier. I must reply in support of my principal suggestion.

In my initial comments in the above captioned proceeding, I suggested that the Commission require the local exchange carriers to maintain the national do-not-call list. The method which I suggested would appear to meet the concerns of all telemarketers except those who desire that there be no national list. When the LECs maintain the list, there will be no question as to whether a telephone number is residential or business. There will be no risk of fraudulent listing. If the states draw from the LECs records, there will be no risk that a person is on one list but not on another.[4] Because the lists will be updated automatically, the minute that a telephone company service order is entered, there will be no risk of use of an outdated list. The telemarketer will not need to keep do-not-call lists because the telemarketer will check the LEC's list immediately before each call. There will be no cost to the Federal Government because the Federal Government will not operate the listing service. The Commission should have little difficulty persuading the FTC to use this suggested method, rather than operating its own list.

The comments submitted in the above captioned proceeding and in the FTC proceeding demonstrate an overwhelming demand for the establishment of a national do-not-call list.

---

[4] There will, in fact, be no need for a state to maintain a separate list.

Because most Americans of record in the above captioned proceeding desire to be on a do-not-call list, the Commission should adopt a provision for its list which is different from the FTC's list. The Commission's list should be opt-out. That is, based on the weight of the evidence of record, the Commission should conclude that most residential telephone consumers desire to be on the list, initially place all residential numbers on the list, and provide consumers who desire to receive commercial telemarketing calls with a telephonic, cost-free means for opting out of the list.

Miscellany

Some telemarketers, e.g., ITC, suggested that the Commission should adopt no rules because not everyone will comply with them. Not everyone is discouraged from murder by its prohibition, but that serves as no basis for decriminalizing murder. A law which reduces harm to consumers serves a good purpose even if some few violate it.

The bulk of the comments in this proceeding demonstrate that the Commission's Rules have not been effective in protecting consumers from telemarketers. The Commission needs to adopt effective penalties for violation of its telemarketing Rules. Among the categories of violation listed at Rule Section 1.80, 47 C.F.R. §1.80, it would appear that violation of telemarketing rules most closely resembles the transmission of indecent/obscene materials or violation of operator services requirements, each of which carries an initial monetary forfeiture of $7,000. Accordingly, the Commission should adopt an initial monetary forfeiture of $7,000 for the violation of any telemarketing rule.

Conclusion

For all the foregoing reasons, the Commission should adopt rules consistent with the suggestions herein.

Respectfully submitted,

/s/ Dennis C. Brown

126/B North Bedford Street
Arlington, Virginia 22201
703/525-9630

Dated: May 18, 2003